SC86474

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel.
Riverside Pipeline Company, L.P., and
Mid-Kansas Partnership,

Respondents,

v.

Public Service Commission
of the State of Missouri,

Appellant.

Appeal from the Circuit Court of Cole County, Missouri
Case No. 02CV324478
The Honorable Thomas J. Brown III

SUBSTITUTE BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

Appellant Missouri Public Service Commission filed this appeal to the Missouri Court of Appeals, Western District, under § 386.540, R.S.Mo. to contest the Cole County Circuit Court's June 9, 2003 Order and Judgment, which found that the Public Service Commission erred as a matter of law. Though the Commission filed this appeal, Riverside Pipeline Company, L.P. and Mid-Kansas Partnership are deemed the appellants under Rule 84.05(e). After Opinion by the Court of Appeals, this Court exercised its jurisdiction to review that decision under its Transfer Order dated January 25, 2005 pursuant to Rule 83.04.

STATEMENT OF FACTS[1]

Respondents Riverside Pipeline Company, L.P. (Riverside) and Mid-Kansas Partnership (Mid-Kansas) entered into new contracts with Missouri Gas Energy (MGE) to supply and transport natural gas to MGE's distribution system in February 1995. MGE distributes natural gas in the Kansas City, Missouri metropolitan area and other locations in Missouri and is a utility subject to the jurisdiction of the Public Service Commission (Commission). In May 1996, MGE,

[1] This Statement of Facts in large part quotes the Court of Appeals' opinion in an earlier related case styled *State ex. rel. Riverside Pipeline Co., L.P. v. Public Service Commission*, 26 S.W.3d 396 (Mo. App. 2000), with cites to the record on appeal added.

Riverside, Mid-Kansas, Western Resources, the Office of the Public Counsel, and the Staff of the Commission signed a Stipulation and Agreement (the Stipulation) settling disputes arising out of the Commission's review of MGE's gas contracts.[2] Schedule DML 1 to Ex. 5 (Appendix 1). On June 11, 1996, the Commission issued an order approving the Stipulation. L.F. 15-17.

On June 25, 1996, a Commission order established Case No. GR-96-450 to follow the over-recovery or under-recovery of MGE's gas costs for the Annual Reconciliation Adjustment Account period from July 1, 1996 through June 30, 1997. L.F. 17-18. Riverside and Mid-Kansas intervened in the case before the Commission as suppliers of natural gas transportation and natural gas to MGE because under certain circumstances Riverside/Mid-Kansas could be obligated to indemnify MGE for amounts it paid them that were later disallowed by the Commission. L.F. 11. The Commission Staff challenged the prudence of the contract between MGE and the Riverside/Mid-Kansas on June 1, 1998. The Staff argued that the execution of the contract between MGE and Riverside/Mid-Kansas was not prudent and recommended a $4,532,449.60 reduction in MGE's gas costs incurred under the contracts with Riverside/Mid-Kansas.[3] L.F. 20.

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[2] Contrary to the court of appeals' Opinion, the Stipulation was not limited to "then pending" disputes.

[3] This amount was later reduced to $3,490,082.81.

On July 31, 1998, Riverside/Mid-Kansas filed a Motion to Dismiss or Limit the Proceedings in Case No. GR-96-450, asserting that the 1996 Stipulation barred the Staff's proposed prudence disallowance and that the Commission lacked jurisdiction to relitigate the terms of the Stipulation. L.F. 12. Riverside/Mid-Kansas subsequently filed a second Motion to Dismiss based on insufficiency of the Staff's direct testimony on August 27, 1998. The Commission denied both motions to dismiss on September 29, 1998. L.F. 13.

In response to the Commission's denials, Riverside/Mid-Kansas filed Applications for Rehearing on each motion to dismiss and also filed a Petition for Writ of Prohibition with the Cole County Circuit Court to prevent the Commission hearing from examining the prudence of the contracts between Riverside/Mid-Kansas and MGE. The Court granted a preliminary order of prohibition, and the Commission thereafter moved to quash the writ on the ground that the Commission should be given the opportunity in the first instance to rule on the meaning of the 1996 Stipulation. L.F. 13-14.

The Circuit Court granted the Commission's Motion to Quash on December 2, 1998. The court found that a portion of the Stipulation was ambiguous and that the Commission "should, in the first instance, determine if it has jurisdiction of the cause after hearing evidence and argument of the parties before it." L.F. 106. The

Commission then, without taking evidence or further argument, issued an order denying both Applications for Rehearing on December 22, 1998. L.F. 13-14.

Riverside/Mid-Kansas filed a Petition for Writ of Review under § 386.510[4] with the Circuit Court on January 15, 1999. On July 26, 1999, the Circuit Court reversed the Commission's order and decision of September 29, 1998 denying Riverside and Mid-Kansas' motion to dismiss or limit. L.F. 96. The court found the Commission's decision was "unlawful, unreasonable, arbitrary, capricious and not based on substantial and competent evidence on the whole record." L.F. 101. The court found, based on the record, that "the Commission acted unlawfully and/or unreasonably when it failed to make any finding that the 1996 Stipulation and Agreement was ambiguous, yet interpreted the Stipulation and Agreement without hearing any testimony or otherwise receiving any evidence to determine the intent of the parties to the Stipulation and Agreement." L.F. 101. In addition, the court found the Commission:

a. failed to make legally sufficient findings of fact or conclusions of law to permit a reviewing court to determine the specific findings made by the Commission and the basis on which those findings were purportedly made;

[4] All statutory references are to the Revised Statutes of Missouri, 1994.

b. failed and refused to receive or consider any evidence interpreting the Stipulation and Agreement;

c. made a specific finding with no legally sufficient evidence on which to base that decision; and,

d. denied rehearing despite all reasons set forth above, and despite this Court's [the circuit court] December 2, 1998 Order finding the Stipulation and Agreement to be ambiguous.

L.F. 102.

The court remanded the cause to the Commission for further action consistent with its order, "including the interpretation of the 1996 Stipulation and Agreement in accordance with the rules of construction and the need for a sufficient and appropriate evidentiary basis for resolution of any language found to be ambiguous." L.F. 102.

On August 4, 1999 Riverside/Mid-Kansas filed their Notice of Appeal of the circuit court's July 26, 1999, judgment, which remanded the cause to the Commission. L.F. 14. On July 25, 2000, the court of appeals dismissed the appeal for lack of a final and appealable Commission order. *State ex rel. Riverside Pipeline Co., L.P. v. Public Serv. Comm'n*, 26 S.W.3d 396 (Mo. App. 2000). On remand, the Circuit Court remanded the proceeding to the Commission in compliance with the court of appeal's mandate "for further proceedings not

inconsistent with the opinion of the Court of Appeals and the orders of this Court." L.F. 104.

On remand, the Commission held a five day evidentiary hearing in September 2001 where the Commission received parol evidence on the parties' intent in drafting the Stipulation and also received evidence on the merits of the Staff's proposed prudence disallowance. L.F. 14. The list of issues to be determined by the Commission in the hearing included whether the Stipulation barred the proposed adjustment. (ROA Vol. I, p. 108).

Seven months later, the Commission issued its Report and Order. L.F. 7 (Appendix 2). The Commission declared that it was unable to determine whether the Stipulation barred Staff's proposed disallowance in this case and future ACA prudence reviews of the decisions associated with the execution of the "Missouri Agreements" covered by the Stipulation.[5] L.F. 33. The Commission then advanced to the merits of the case and rejected the Staff's proposed prudency disallowance for the ACA period covered in Case No. GR-96-450. L.F. 37.

[5] The "Missouri Agreements" were defined in the stipulation to include the Sales Agreement dated February 24, 1995, between MGE and Mid-Kansas (the MKP II Interim Firm Gas Sales Contract) and the transportation agreement of the same date between MGE and Riverside (Riverside I).

Riverside-Mid-Kansas filed an Application for Rehearing with the Commission to once again request a ruling on the meaning of the Stipulation. L.F. 41. The Commission denied the Application by majority vote. L.F. 48 (Appendix 3). Commissioner Connie Murray dissented from the ruling of the Commission denying the application for rehearing and expressly stated that the Commission erred in not finding that the Stipulation "bars the Staff's proposed disallowance in this case and precludes any further ACA prudence review of the decisions associated with the execution of the Missouri Agreements." L.F. 53. Commissioner Murray based her dissent in part on the fact that "[t]he Staff and Office of the Public Counsel agree with Riverside/Mid-Kansas that the Commission was obligated on remand to construe the meaning of the 1996 Stipulation and Agreement" and on the fact that the Commission's failure to construe the Stipulation leaves the parties "in the untenable position of having to relitigate the issue year after year." L.F. 53.

Riverside/Mid-Kansas then filed a Petition for Writ of Review in the Cole County Circuit Court. L.F. 1. The Circuit Court issued the Writ of Review. L.F. 58. On June 9, 2003, the Circuit Court issued its Order and Judgment, holding that the Commission erred in refusing to interpret the Stipulation and held that the Stipulation "(i) barred the Staff's proposed disallowance in this case, and (ii) precludes any further ACA prudence review of the decisions associated with the

execution of the Missouri Agreements and (iii) only permits review of compliance and operational matters." L.F. 145, 158. The Court then ordered the Commission "to limit any future proceedings to questions which have arisen or may arise regarding compliance and operational matters under the contracts resolved by the Stipulation…" L.F. 158.

On July 13, 2003, the Commission filed its Notice of Appeal. L.F. 159. Because of Rule 84.05(e), the Commission, which filed the appeal, proceeded as the respondent and Riverside/Mid-Kansas proceeded as the appellants. After full briefing and oral argument, the Court of Appeals, Western District, dismissed the appeal, finding that Riverside/Mid-Kansas were not aggrieved parties and thus lacked standing to file an appeal. (Appendix 4). The Opinion is ambiguous as to whether the "appeal" being discussed was the appeal to the court of appeals filed by the Commission or the petition for writ of review filed in the circuit court by Riverside and Mid-Kansas.

POINTS RELIED ON

I. The Court of Appeals Erred in Dismissing the Commission's Appeal Because the "Aggrieved" Person Test of § 512.020 Does Not Define the Standing Requirements for a Petition for Writ of Review Under § 386.510 In That a Petition for Writ of Review Under § 386.510 Is Not An Appeal But Rather An Equitable Proceeding That May Be Filed By Any "Interested" Person

Barlow v. State, 114 S.W.3d 328 (Mo. App. 2003)

State ex rel. Consumers Pub. Serv. Co. v. Public Serv. Comm'n,

180 S.W.2d 40 (Mo. banc 1944)

State ex rel. Southwestern Bell Tel. v. Brown,

795 S.W.2d 385 (Mo. banc 1990)

§ 386.500

§ 386.510

§ 386.540

§ 512.020

II. The Commission Erred in Reaching the Merits of the Staff's Proposed Disallowance Review Because Further Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements Was Precluded In That The Stipulation Settled and Compromised the Prudence of the Missouri Agreements

Knapp v. Missouri Local Government Employees Retirement Sys.,

738 S.W.2d 903 (Mo. App. 1987)

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88 S.W.3d 471 (Mo. App. 2002)

Parker v. Pulitzer Co., 882 S.W.2d 245 (Mo. App. 1994)

Transit Cas. Co. in Receivership v. Certain Underwriters,

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§ 536.070

III. The Court of Appeals Erred in Holding that Circuit Courts in Missouri Lack Authority to Enjoin the Public Service Commission Because Circuit Courts Have the Authority to Enjoin the Public Service Commission In That Mo. Const. Art. V, §§ 4.1 and 14(a) Grant Circuit Courts Authority to Control Tribunals Within Their Jurisdiction

State ex rel. AG Processing, Inc. v. Thompson,

100 S.W.3d 915 (Mo. App. 2003)

State ex rel. County of Jackson v. Pub. Serv. Comm'n,

14 S.W.3d 99 (Mo. App. 2000)

State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n,

741 S.W.2d 114 (Mo. App. 1987)

Union Electric Co. v. Public Service Commission,

591 S.W.2d 134 (Mo. App. 1979)

Mo. Const. Art. V, §§ 4.1 and 14(a)

§ 386.510

SUMMARY OF ARGUMENT

The issues in this case are divided into two groups: (1) the substantive issues of the underlying dispute related to the interpretation of a stipulation entered into by the parties; and (2) the new jurisdictional/procedural issues raised by the Court of Appeals related to the test for standing to file a petition for writ of review of an administrative proceeding (which was the basis of the Court of Appeals' dismissal of the appeal) and a circuit court's power to enjoin the Public Service Commission (which the Court of Appeals raised and decided in dicta).

The procedural issues should be easily disposed of. First, Missouri law is clear that a petition for writ of review is not an appeal and thus the "aggrieved" party test for filing an appeal in § 512.020 does not govern who may file a petition for writ of review in circuit court. Second, whether a circuit court may enjoin the Public Service Commission is not properly before the Court because no party requested injunctive relief below. To the extent injunctive relief may be necessary in a subsequent suit if the Court does not reach the merits of this case, the court of appeals misread § 386.510, which was not intended to remove the constitutional authority granted to circuit courts to govern tribunals within their jurisdiction.

With respect to the substantive issues, the Commission acknowledged its obligation to determine the meaning of a 1996 Stipulation so that Riverside/Mid-Kansas would not be subjected to needless protracted litigation. Nevertheless, and

despite repeated instructions from the circuit court, the Commission failed to properly apply the rules of contract construction to resolve any ambiguities in the Stipulation and thus found that it was unable to determine the intended meaning. Had the Commission properly applied the rules of contract construction, it would have found that the Stipulation (i) barred the Commission Staff's proposed disallowance in this case and (ii) precludes any further ACA prudence review of the decisions associated with the execution of the "Missouri Agreements."

Even though the Commission rejected its Staff's proposed disallowance, the Commission's failure to determine the meaning of the Stipulation will require Riverside/Mid-Kansas to re-litigate in each subsequent ACA period both the meaning of the Stipulation and the prudence of the execution of the pre-1996 gas supply contracts. Under the Stipulation, Riverside/Mid-Kansas paid almost three million dollars to settle all disputes concerning the prudence of the decisions associated with the execution of the Missouri Agreements. An ambiguity in the Stipulation does not provide a basis to deny Riverside/Mid-Kansas the consideration they received in the settlement—avoiding protracted litigation and yearly prudence reviews.

Construction of the Stipulation is a matter of law. A dissenting Commission member and the circuit court agreed that the Stipulation was intended to preclude

all future ACA prudence reviews and avoid protracted litigation. This Court should affirm the circuit court's interpretation of the Stipulation.

ARGUMENT

I. The Court of Appeals Erred in Dismissing the Commission's Appeal Because the "Aggrieved" Person Test of § 512.020 Does Not Define the Standing Requirements for a Petition for Writ of Review Under § 386.510 In That a Petition for Writ of Review Is Not An Appeal But Rather An Equitable Proceeding That May Be Filed By Any "Interested" Person

A. Standard of Review

Whether § 512.020 governs the filing of a petition for writ of review in circuit court is purely a question of law. "This Court will exercise its independent judgment in correcting errors of law." *All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994).

B. The "Aggrieved" Party Test Has No Application Here

Though not raised by either party, the court of appeals determined *sua sponte* that it lacked jurisdiction to hear this appeal based on a finding that Riverside Pipeline Company and Mid-Kansas Partnership were not "aggrieved" parties under § 512.020 and thus did not have standing to "appeal." The Opinion repeatedly refers to filing a petition for writ of review as an "appeal" (Op. at pp. 7-9) and then restricts such a filing to those satisfying § 512.020's "aggrieved" party requirement.

The court of appeals erred in finding that a petition for writ of review is an "appeal" and in holding that only an "aggrieved" party under § 512.020 may file a petition for writ of review. Under the Public Service Commission Act, when the Commission issues an order, any person "interested therein" has the statutory right to apply for a rehearing of that order. § 386.500.1 (App. 5). After a motion for rehearing is decided by the Commission, the party that applied for rehearing has the right to file a petition for writ of review with the circuit court "for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined." § 386.510.

This Court has held that a circuit court's review of a Commission decision under § 386.510 is not an "appeal" but is instead a proceeding in equity. *See* *State ex rel. Southwestern Bell Tel. v. Brown*, 795 S.W.2d 385, 388 (Mo. banc 1990) ("We hold ... that review permitted under Section 386.510 is a separate action, and for purposes of procedural analysis, not an appeal."). The circuit court's equitable review under § 386.510 is handled as a trial. *See* § 386.510 ("The circuit courts of this state shall always be deemed open for the trial of suits brought to review the orders and decisions of the commission as provided in the public service commission law and the same shall be tried and determined as suits in equity."). Here all the evidence was presented to the circuit court for its review and it exercised its review as an original proceeding.

The "interested" person standard of § 386.500.1 that governs the right to apply for rehearing of a Commission decision also governs "the right to be a party to review proceedings both in the circuit and appellate courts." *State ex rel. Consumers Pub. Serv. Co. v. Public Serv. Comm'n*, 180 S.W.2d 40, 46 (Mo. banc 1944). "[T]he Public Service Commission Act provides its own Code for proceedings for judicial review of its orders and ... the reference to the general code is only to make appeals subject to the usual rules of appellate procedure where procedure is not otherwise specified in the Act. This Act itself specifies who shall have the right to be a party to review proceedings both in the circuit and appellate courts." *Id*. at 45-46.

The court of appeals' Opinion states that "Section 386.540 further provides, in subsection 4, that an appeal from a decision of the Commission is subject to the general laws relating to the Supreme Court and the court of appeals." Op. at 8. That statement is incorrect. Section 386.540.4 actually states: "The general laws relating to appeals to the supreme court and the court of appeals in this state shall, so far as applicable and not in conflict with the provisions of this chapter, apply to *appeals* taken under the provisions of this chapter." (Emphasis added). That section is referring to appeals to the appellate courts from review proceedings in the circuit court--not to taking a writ of review to the circuit court under § 386.510. Here the Commission, not Riverside/Mid-Kansas, filed the § 386.540 appeal.

Further, as this Court held in *State ex rel. Consumers*, § 386.540 only makes the general rules of appellate procedure applicable where not otherwise addressed by statute. 180 S.W.2d at 45-46. Here, § 386.510 specifically governs who may seek review of a decision or order of the Commission and permits any "interested" person to file a petition for writ of review.

If the right to file a petition for writ of review were governed by § 512.020 like an appeal, it would technically be impossible for anyone to be "aggrieved" by an order of the Commission. As this Court recognized long ago, "the Commission is not a court and cannot enter a judgment or order that could act directly upon anyone's rights" and thus "no one could be aggrieved by an order of the Commission in the sense he would be by a court judgment ...." *State ex rel. Consumers*, 180 S.W.2d at 44. There is simply no legal or practical reason to apply the "aggrieved" party test to the right to file a petition for review in the circuit court.

This Court should find that this appeal is properly before the Court and affirm the circuit court's judgment interpreting the Stipulation at issue here.

C. Even If § 512.020 Applies, Riverside/Mid-Kansas' Petition for Writ of Review Was Proper

Even if the Court holds that § 512.020 governs the filing of a petition for writ of review generally, a "jurisdictional ruling must be subject to appeal, even if

it is not specified by statute, for otherwise there would be no review of a court's jurisdiction." *Barlow v. State*, 114 S.W.3d 328, 332 (Mo. App. 2003). Because Riverside and Mid-Kansas sought review of the Commission's jurisdiction, they did not need statutory authority to file the petition for writ of review.

Just as in *Barlow*, Riverside and Mid-Kansas argued that the Commission lacked jurisdiction to hear the claims against it. The Commission's determination that it had jurisdiction, however, and the power that ruling gives it to proceed with several pending cases against Riverside and Mid-Kansas that have been held in abeyance pending the outcome of this case, must be subject to appeal, "for otherwise there would be no review of ... jurisdiction." *Id.*

In any event, if the "aggrieved" party test of § 512.020 applies here, Riverside and Mid-Kansas should be considered aggrieved. Generally, for a party to be considered "aggrieved," the judgment in question must "operate[] prejudicially and directly on his personal or property rights or interests." *Shelter Mut. Ins. Co. v. Briggs*, 793 S.W.2d 862, 863 (Mo. banc 1990). "[A]s used in § 512.020, 'aggrieved' means 'suffering from an infringement or denial of legal rights'." *Government Employees Ins. Co. (GEICO) v. Clenny*, 752 S.W.2d 66, 68 (Mo. App. 1988) (quoting *Farrell v. DeClue*, 382 S.W.2d 462, 466 (Mo. App. 1964)). As discussed above, this is technically impossible because the Commission has no authority to judge anyone's legal rights.

But if "aggrieved" can be construed in such a way that a person could be aggrieved by a decision of the Commission, Riverside and Mid-Kansas surely meet any such standard. The Commission included in its Report and Order a finding of fact and/or conclusion of law that the key provision of the Stipulation that Riverside and Mid-Kansas entered into, and paid $3 million in consideration to support, was too ambiguous to be construed and was thereby given no force or effect. In doing so, the Commission denied Riverside and Mid-Kansas' primary contention that the Commission lacked jurisdiction to proceed with further ACA prudence reviews. As a direct result, Riverside and Mid-Kansas have suffered and are currently incurring financial harm through continued litigation as a direct result of the Commission's wrongful exercise of jurisdiction over them in additional ACA prudence reviews.[6]

If the "aggrieved" party standard applies, Riverside and Mid-Kansas should be considered aggrieved.

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[6] In *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915 (Mo. App. 2003), the court found that a writ of prohibition was appropriate to address a jurisdictional question because of the "unwarranted expense and delay to the parties involved." *Id.* at 920 (quoting *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 79 (Mo. banc 1974)). It is difficult to conceive how a writ of prohibition would lie to address an issue that did not render a party "aggrieved" to file an appeal.

II. The Commission Erred in Reaching the Merits of the Staff's Proposed Disallowance Review Because Further Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements Was Precluded In That The Stipulation Settled and Compromised the Prudence of the Missouri Agreements

In 1996, Riverside, Mid-Kansas and the Staff of the Commission, along with others, entered into a written settlement agreement entitled "Stipulation and Agreement" to resolve certain disputes between the parties. (App. 1). The Stipulation provides that, as consideration for Riverside/ Mid-Kansas paying almost three million dollars to MGE and dismissing a pending court action, "neither the execution of [certain agreements entered into by MGE's predecessor], nor the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review" throughout the terms of these agreements. The Commission entered an Order approving the Stipulation in 1996.

The Staff nevertheless initiated another prudence review, Case No. GR-96-450, of one of the Missouri Agreements. Despite instructions from the circuit court to construe the Stipulation, and the list of issues filed with the Commission seeking an interpretation of the Stipulation, the Commission failed to do so and instead reached the merits of the Staff's proposed prudence disallowance. This Court should find, just as a dissenting member of the Commission and the circuit

court already have, that the Stipulation (i) barred the Staff's proposed disallowance in this case, (ii) precludes any further ACA prudence review of the decisions associated with the execution of the "Missouri Agreements", and (iii) only permits review of compliance and operational matters.

A. Standard of Review

"The role of [a] court in reviewing a decision of the PSC is to determine whether the PSC's order is lawful and reasonable." *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 954 S.W.2d 520, 528 (Mo. App. 1997); § 386.510. Lawfulness "turns on whether the Commission had the statutory authority to act as it did." *Friendship Village of South Carolina v. Public Serv. Comm'n*, 907 S.W.2d 339, 344 (Mo. App. 1995). "When determining whether the Commission's order is lawful, the appellate courts exercise unrestricted, independent judgment and must correct erroneous interpretations of the law." *Id*. Like the review undertaken by the circuit court below, the construction and interpretation of the Stipulation at issue here is a question of law for this Court to decide. *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 32 (Mo. banc 1991).

Analysis of whether the Commission's decision is reasonable requires a review of the Commission's orders to determine "whether the PSC's decision was supported by substantial and competent evidence on the whole record, whether the

decision was arbitrary, capricious, or unreasonable, or whether the PSC abused its discretion." *Associated Natural Gas*, 954 S.W.2d at 529. To be supported by "substantial evidence," the Commission's order must be based on "evidence which, if true, would have a probative force upon the issues, and necessarily implies and comprehends competent, not incompetent, evidence." *State ex rel. Mobile Home Estates v. Public Serv. Comm'n*, 921 S.W.2d 5, 9 (Mo. App. 1996).

B. The Commission's Order Unlawfully Failed To Interpret the Stipulation To Preclude the Staff's Proposed Prudence Disallowance

The primary consideration that Riverside-Mid-Kansas received in the Stipulation was the preclusion of future prudence reviews of the decisions associated with the execution of the Missouri Agreements. Nevertheless, the Commission Staff recommended a prudence disallowance under one of the Missouri Agreements in 1998 and continues to pursue other ACA prudence reviews for subsequent time periods.

At one point below, the circuit court specifically instructed the Commission to construe the Stipulation but the Commission refused to do so and proceeded with the merits of the prudence review. L.F. 102 (circuit court remanded for "interpretation of the 1996 Stipulation and Agreement in accordance with the rules of construction"). After a second instruction from the circuit court to construe the

meaning of the Stipulation before making a final determination on the merits of the prudence review, the Commission determined that it was unable to determine the meaning of the Stipulation and issued a final Report and Order rejecting the Staff's proposed prudence disallowance for the ACA period covered in Case No. GR-96-450.

As a dissenting member of the Commission and the circuit court both found below, the Commission had no authority to reopen the issues settled by the 1996 Stipulation and thereby impose on the settling parties the same "substantial and expensive litigation" that the Commission purported to end by the Stipulation. By failing to properly apply the rules of contract construction to determine the meaning of the Stipulation, the Commission nullified a significant part of the Stipulation.

1. The Stipulation Precludes Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements

The Stipulation, like any other settlement agreement, must be construed using ordinary rules of contract construction. *See* *Liquidation of Professional Medical Ins. Co. v. Lakin*, 88 S.W.3d 471, 476 (Mo. App. 2002). A contract must be construed as a whole so as to not render any terms meaningless. *Transit Cas. Co. in Receivership v. Certain Underwriters*, 963 S.W.2d 392, 396 (Mo. App. 1998). A construction that gives a reasonable meaning to each phrase and clause

and harmonizes all provisions is preferred over a construction that leaves some of the provisions without function or sense. *Id*. Even if an ambiguity is found, the most reasonable and fair construction should be adopted. *Industrial Bank & Trust Co. v. Hesselberg*, 195 S.W.2d 470 (Mo. banc 1946); *Paisley v. Lucas*, 143 S.W.2d 262, 267 (Mo. 1940). This latter rule of construction is founded on the fundamental notion of equity between the parties. *Tureman v. Altman*, 239 S.W.2d 304, 309 (Mo. banc 1951). The language of a contract should be given a fair, reasonable and practical construction because it is presumed that the parties contracted for fair, reasonable and practical results. *Id.* Finally, a contract should be construed against the party that drafted it—in this case the Commission Staff—and in favor of the party that did not. *Parker v. Pulitzer Co.*, 882 S.W.2d 245, 249 (Mo. App. 1994).

The language of the Stipulation at issue here is found in Paragraph 5, which states:

> 5. *As a result of this Stipulation, the Signatories agree that neither the execution of the MKP/WR Sales Agreement and the Riverside/WR Transportation Agreement I, nor the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review.* In addition, the Signatories agree that the transportation rates and gas costs charged pursuant to the Missouri

Agreements shall not be the subject of any further ACA prudence review until the case associated with the audit period commencing July 1, 1996 and ending June 30, 1997. The Missouri Agreements will be subject to the compliance and operational review of the Staff for all periods on and after July 1, 1994, and MGE's ACA balance may be subject to adjustment as a result of such review.[7] The intent of the Signatories by this Stipulation is that the Commission, in

[7] As a result of the Commission's decision in Case No. GO-94-318, MGE is scheduled to have new tariffs in operation under an incentive PGA commencing July 1, 1996. Since those tariffs have not been submitted to the Commission, it is difficult to state with any certainty how they may relate to the settlement being effected by this Stipulation. However, it is the intention of the signatories that to the extent there are gas cost (non-transportation) issues involving any of the Missouri Agreements which are relevant to the time periods after July 1, 1996, those amounts will come under the Incentive PGA provisions as approved by the Commission. As a result, any issues related to gas costs associated with the Missouri Agreements will be subject to the provision that unless MGE's costs subject to the Incentive PGA provisions to be filed rise to the level where a prudence review is triggered, there will be no prudence review of the Missouri Agreements.

adopting this Stipulation, issue an order holding that the transportation rates and gas costs charged pursuant to the Missouri Agreements shall not be disallowed by the Commission based on the reasons described above in this paragraph in Case Nos. GR-094-101, GR-94-227, GR-94-228, GR-95-82 and GR-96-78, and that the findings and conclusions regarding the prudence of the execution of the Missouri Agreements made by the Commission in Case No. GR-93-140 shall be compromised and settled as provided for herein. Although the prudence of entering into the MKP/WR Sales Agreement and the Riverside/WR Transportation Agreement I is finally settled by this Stipulation, additional questions may arise regarding the administration of the contracts by MGE and WR in Staff's compliance and operational review for all periods on and after July 1, 1994, as described above. Therefore, *this Stipulation is not designed to preclude the Staff from making proposed adjustments regarding issues involving the manner in which gas is actually taken under the contracts (e.g. gas which was available under the contract was not taken for some reason) or issues involving billing matters (e.g., MGE paid more than was required under the contract due to a billing or mathematical error)*….

App. 1 (emphasis added). Even if the Stipulation is ambiguous as the Commission found, its meaning nevertheless exists and must be determined.

At issue in this case is a prudence review of the decisions association with the execution of the "Missouri Agreements." Paragraph 4 of the Stipulation defines the term "Missouri Agreements" to include a number of agreements, including the "Sales Agreement dated February 24, 1995, between MGE and MKP [Mid-Kansas] ... hereinafter the 'MKP II Interim Firm Gas Sales Contract'." The prudence disallowance rejected by the Commission concerned this MKP II agreement.

The first sentence of Paragraph 5 clearly prohibits a prudence review of the Missouri Agreements: "the Signatories agree that neither the execution of the MKP/WR Sales Agreement and the Riverside/WR Transportation Agreement I, nor the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review." Riverside/Mid-Kansas rely on and seek to enforce this agreement.

Despite the plain and simple language in the first sentence of paragraph 5, the Commission was unable to determine the meaning of the Stipulation because the second sentence of paragraph 5 states that "the Missouri Agreements shall not be the subject of any further ACA prudence review until the case associated with the audit period commencing July 1, 1996 and ending June 30, 1997."

But the meaning of the second sentence is illuminated by the next sentence, which in a footnote provides that "any issues related to gas costs associated with the Missouri Agreements will be subject to the provision that unless MGE's costs subject to the Incentive PGA provisions to be filed rise to the level where a prudence review is triggered, *there will be no prudence review of the Missouri Agreements.*" (Emphasis added). The prudence review at issue here was not triggered by MGE's costs subject to the Incentive PGA, and thus was not within the authorized prudence review.

Paragraph 5 goes on to state that "the findings and conclusions regarding the prudence of the execution of the Missouri Agreements made by the Commission in Case No. GR-93-140 shall be compromised and settled …." In exchange for compromising and settling the prudence of the decisions associated with the execution of the Missouri Agreements, Riverside/Mid-Kansas paid almost three million dollars.

Further, the last two sentences of Paragraph 5 state the parties' intent as to what the Commission is authorized to do in the future with respect to the Missouri Agreements, i.e., conduct compliance and operation reviews. Notably, the authority to conduct future prudence reviews of the Missouri Agreements is not listed as within the authority of the Commission after approval of the Stipulation.

Construing paragraph 5 as a whole and giving meaning to all terms, as required by Missouri law, the Stipulation limits future review to issues pertaining to (i) how MGE used its gas purchases available under the terms of the agreement, and (ii) inaccurate billing/mathematical errors.

2. Parol Evidence Shows the Parties' Intent Was to Preclude Future Prudence Reviews

To the extent an ambiguity remains after construing paragraph 5 as a whole, the parol evidence heard by the Commission favors the interpretation offered by Riverside and Mid-Kansas. The evidence presented by the only witness involved in the final negotiation of the Stipulation supported the interpretation that future prudence reviews of the Missouri Agreements are barred by paragraph 5.

a. Mr. Langley's Testimony Proved the Parties' Intent

Riverside/Mid-Kansas presented the testimony of Mr. Dennis Langley, who personally participated in the final negotiations of the Stipulation. (ROA Tr. Vol. 3, pp. 456, 522). Mr. Langley unequivocally testified that the Stipulation (i) barred the Staff's proposed disallowance in this case and (ii) precludes any further ACA prudence review of the decisions associated with the execution of the Missouri Agreements while allowing other issues related to these agreements to come before the Commission for review, *i.e.*, certain compliance and operational matters. (ROA, Ex. 5, pp. 4-7). Mr. Langley testified:

> Here is the way I would interpret it: From the date of the execution [of the Stipulation], everything was settled and nothing could be looked at until July 1 of '94 .... Beginning in July 1, '94 and thereafter, a smaller zone of prudence could be looked at, but it would only be the zone that relates to compliance and operations as it's been described .... Then once you get to '96, it's even a smaller zone yet. It can only be those inside compliance and operations, and [only] if they've [MGE] vested their PGA standard .... that's the way Mr. Hack explained it to me. He was the drafter of the language."

(ROA, Tr. Vol. 3, pp. 454-55).

Mr. Langley further testified that he would not have authorized such a significant settlement payment under the Stipulation as a mere stop-gap measure, but only committed this amount to forever resolve the prudence of the decisions associated with the execution of the Missouri Agreements. (ROA, Ex. 5, pp. 5-6). Riverside/Mid-Kansas explained to the Commission's then-General Counsel during the negotiations that the first draft of the Stipulation was unacceptable because it did not settle the issue in perpetuity, to which the General Counsel responded that he was aware of Riverside/Mid-Kansas' position and that he believed the following draft would be acceptable. (ROA, Ex. 5, pp. 7-8).

b. Additional Testimony From Mr. Langley That Was Erroneously Excluded Further Proved the Parties' Intent

Riverside/Mid-Kansas also request this Court to consider under Rule 84.13 admissible testimony from Mr. Langley that was excluded from evidence by the Commission's regulatory law judge even though no party objected to it. (ROA, Tr. Vol. 5, p.739; Vol. 3, pp. 387-88; Ex. 6, p. 2 line 20 through p. 3 line 15 and Schedule DML-8). This testimony has been preserved in the record of this proceeding for the Court's review. (ROA, Tr. Vol. 5, p. 741; Vol. 3, p. 382).

The stricken testimony from Mr. Langley specifically stated that Mr. Hack, the former general counsel for the Commission who actually drafted the Stipulation, supported his interpretation of the Stipulation. Mr. Langley's testimony in this regard was based on Mr. Hack's response to a data information request issued by the Commission Staff. Mr. Hack's response to the Staff's request follows:

> Q. Please provide dates that negotiations were held, and Mr. Hack's recollection of the intent of the parties with regard to the prudence of the "Missouri Agreement."
>
> A. Upon reviewing the May 2, 1996 Stipulation and Agreement, it is Mr. Hack's recollection that, by executing and filing the

> agreement, the parties intended that the MoPSC conclusively and finally resolve all issues associated with the prudence of the execution of the "Missouri Agreements" and that, on a going forward basis beginning with the ACA period commencing July 1, 1996, the only aspect of the "Missouri Agreements" that would be subject to the review and possible adjustment on prudence grounds was the manner in which MGE operated under the "Missouri Agreement" (i.e., volumes taken, etc.). Compliance review (i.e., review of billing and payment accuracy), and possible adjustment on such grounds, was also preserved for the "Missouri Agreements" for periods beginning on an July 1, 1994, by the intent of the parties in the May 2, 1996, Stipulation and Agreement.

L.F. 144.

Section 536.070 favors the receipt of evidence rather than its exclusion. Subsection (8) states:

> Any evidence received without objection which has probative value shall be considered by the agency along with other evidence in the case .... Irrelevant and unduly repetitious evidence shall be excluded.

The evidence at issue was only approximately one and a half pages in length and

therefore could not be said to be unduly repetitious, and was clearly not irrelevant. Therefore, it should not have been excluded, and to do so was error.

"An administrative agency may not arbitrarily ignore relevant evidence not shown to be disbelieved. Only if it makes a specific finding that undisputed or unimpeached evidence is incredible and is unworthy of belief may it disregard such evidence." *Knapp v. Missouri Local Government Employees Retirement Sys.*, 738 S.W.2d 903, 913 (Mo. App. 1987). Mr. Langley's testimony stands undisputed by any witness who personally participated in the final negotiations which led to the Stipulation, and accordingly cannot be ignored, as the Commission did in its Report and Order.

Riverside/Mid-Kansas' interpretation of paragraph 5 of the Stipulation is the only interpretation that has been advanced that attempts to harmonize the entirety of paragraph 5. Further, it is the interpretation given to the Stipulation at the time of negotiation and execution by the primary Staff negotiator, who explained it as such to Mr. Langley when the Stipulation was being drafted. (ROA, Tr. Vol. 3, pp. 450, 455-56, 497; Ex. 5, pp. 6-9). This testimony shows it was the intent of the parties, including Staff, in agreeing to the Stipulation, that the decisions associated with the execution of the Missouri Agreements not be subjected to any further ACA prudence review. (*Id.*).

The primary purpose of parol evidence is to ascertain the intent of the parties. The excluded testimony citing Staff's own representative's testimony in the final negotiation and execution of the Stipulation should have been admitted to prove the parties' intent and to bolster Mr. Langley's testimony.

c. Staff's Witnesses Lacked Personal Knowledge

Staff witness Mr. Shaw admitted that he did not know who authorized Mr. Hack to sign the Stipulation on behalf of Staff, but that it would have been someone at the division director or executive director level. (ROA, Tr. Vol. 7, p. 1018). None of the Staff witnesses could or did testify to the parties' intent based on personal knowledge. In its Report and Order, the Commission appears to recognize this, stating that "there was no testimony indicating that they [Staff's witnesses] were directly involved in the final negotiations that led to the execution of the stipulation and agreement." L.F. 19.

Mr. Shaw admitted at the hearing that pursuant to the first sentence of paragraph 5 of the Stipulation "the decisions associated with all of the Missouri Agreements [which include Mid-Kansas II] would not be subject to further ACA prudence review." (ROA, Tr. Vol. 7, p. 978). Mr. Shaw further admitted during his deposition in this case that it is "the decision-making process that we're [*i.e.*, Staff] interested in." (ROA, Ex. 8, Schedule WCP 7-1, p. 2). In other words, Mr. Shaw admitted that the Stipulation (i) bars the Staff's proposed disallowance in this

case and (ii) precludes any further ACA prudence review of the decisions associated with the execution of the "Missouri Agreements."

Because no witness who testified contrary to Mr. Langley personally participated in the final negotiations, to determine that the Stipulation meant something other than what Mr. Langley testified would not be supported by competent and substantial evidence on the record and would be contrary to the overwhelming weight of the record evidence.

3. If All Else Fails, the Stipulation Should Be Construed Against the Drafting Party

Even if the undisputed personal, first-hand knowledge of Mr. Langley was insufficient to interpret paragraph 5, the Commission erred in failing to determine the intended meaning of the Stipulation at all, rather than applying the final rule of contract construction--a contract should be construed against the party that drafted it and in favor of the party that did not. *Parker v. Pulitzer Pub. Co.*, 882 S.W.2d 245, 249 (Mo. App. 1994). "[T]he trier of fact should interpret the contract in the light most favorable to the party who did not draft the contract." *Id.* at 249-50.

It is undisputed on the record of this case that the Stipulation was drafted by Staff's representative in the negotiations. (ROA, Ex. 5, pp. 7-8; Tr. Vol. 3, p. 455). Staff admitted this fact. (ROA, Ex. 6, Schedule DML-7). Accordingly, the Stipulation must be construed against Staff and in favor of Riverside/Mid-Kansas.

III. The Court of Appeals Erred in Declaring that Circuit Courts in Missouri Lack Authority to Enjoin the Public Service Commission Because Circuit Courts Have the Authority to Enjoin the Public Service Commission In That Mo. Const. Art. V, §§ 4.1 and 14(a) Grant Circuit Courts Authority to Control Tribunals Within Their Jurisdiction

Despite the fact that none of the parties in this case have requested injunctive relief, the court of appeals nevertheless decided, in obvious dicta, that circuit courts in Missouri have no authority to enjoin the Public Service Commission. The issue arose in the context of the court of appeals disagreeing with the contention by Riverside/Mid-Kansas that if a court does not interpret the Stipulation, they will be forced to re-litigate the issue year after year. The court of appeals held that this was not true because Riverside/Mid-Kansas "would be free to seek injunctive relief against the PSC …." Op. at 10. But the Opinion then contradicts itself by finding, in admitted contradiction to other appellate decisions, that § 386.510 (App. 6) precludes circuit courts from having any injunctive power over the Commission.

The issue of a circuit court's power to enjoin the Commission should never have been an issue in this case because the court of appeals had jurisdiction over the Commission's appeal to challenge the circuit court's interpretation of the Stipulation. Had the court of appeals reached the merits of the case, as this Court should do, there will be no need for Riverside or Mid-Kansas to seek an injunction

against the Commission. Because the court of appeals' holding on this issue was dicta, Riverside/Mid-Kansas ask this Court to disregard the issue entirely.

But if this Court does not reach the merits of this case, Riverside/Mid-Kansas will be subjected once again to lengthy, expensive and complex litigation concerning the Stipulation and the Missouri Agreements. There are currently six ACA review proceedings pending before the Commission in which Staff has proposed disallowances based on the prudence of the execution of the Missouri Agreements, which have been held in abeyance pending the outcome of this litigation. More cases may follow. Counsel for the Staff informed the Commission below that:

> there is almost no likelihood that the Commission will ever consider any additional evidence on the construction of the Stipulation and Agreement short of going to the state of Kansas and turning over rocks to look for loose pieces of paper. I think the parties have presented the Commission with all of the evidence that either of them or any of them had at their disposal to bring to bear on this issue. I think it is extremely important for the Commission to actually reach a decision one way or the other on this issue because I think that it is a condition precedent for the Commission considering the evidence that is brought to bear on the merits …. [Tr. Vol. 8, pp. 1153-54]

Accordingly, the only new element in these additional ACA proceedings is the availability of injunctive relief or other extraordinary relief given the ambiguous court of appeals Opinion. Because the issue of whether a circuit court may enjoin the Commission will necessarily rise again if the merits of this case are not resolved, Riverside and Mid-Kansas ask this Court in that instance to resolve the issue rather than cause these parties to further extend this protracted litigation.

The Opinion below misinterprets § 386.510 by precluding circuit courts from exercising the authority granted to them in the Missouri Constitution to control tribunals within their jurisdiction. Mo. Const. Art V, §§ 4.1 and 14(a). The Opinion itself notes that other appellate decisions have recognized the authority of the circuit courts to enjoin the Commission, citing *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915 (Mo. App. 2003); *State ex rel. County of Jackson v. Pub. Serv. Comm'n*, 14 S.W.3d 99 (Mo. App. 2000); and *State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n*, 741 S.W.2d 114 (Mo. App. 1987). The writs issued by the circuit courts in these cases were not upheld on appeal, but there was no challenge to the authority of the circuit courts to issue the writs in the first place. And, in *Union Electric Co. v. Public Service Commission*, 591 S.W.2d 134 (Mo. App. 1979), a writ enjoining the Commission was made absolute.

In *State ex rel. AG Processing*, the court held that a writ is an appropriate remedy where a quasi-judicial body lacks jurisdiction to proceed. 100 S.W.3d at 919. Its holding in this regard was based, in part, on the fact that the Commission "is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto." *Id.*

Properly interpreted, § 386.510 does not prohibit the circuit courts from enjoining the Commission in all instances, rather it only prohibits circuit courts from interfering with the original jurisdiction of the Commission. *State ex rel. and to Use of Public Service Comm'n v. Blair*, 146 S.W.2d 865, 868 (Mo. banc 1941). "[T]he Act removes the power of courts to enjoin the Commission or to pass upon such subject matter except in review of the proceedings of the Commission in the manner set forth in the Act." *Id.* Here the Commission has already attempted to construe the Stipulation and thus Riverside/Mid-Kansas should be allowed to pursue an injunction or other extraordinary writ proceeding in the circuit court in the event this Court does not reach the merits of this case—particularly where the Commission's own Staff has indicated there is no additional evidence to present on the interpretation of the Stipulation. Accordingly, the circuit court would be vested with the power to enjoin the Commission from exceeding its jurisdiction.

CONCLUSION

The court of appeals wrongly held that the "aggrieved" party test of § 512.020 governs standing to file a petition for writ of review from a decision of the Commission under § 386.540. Under the plain language of the statute, any "interested" person may file such a petition. On the merits of this case, construing the Stipulation using the appropriate rules of contract construction is a question of law for the Court. The circuit court engaged in the appropriate review and reached the right conclusion. For the reasons set forth above, Riverside and Mid-Kansas request this Court to hold that the Commission erred as a matter of law in its Report and Order and issue an Opinion affirming the Judgment of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b) & (g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. R Civ. P. 84.06(b) and, according to the word count function of MS Word 2000 by which it was prepared, contains 9,258 words and 891 lines, exclusive of the cover, Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing this Substitute Brief of Respondents in electronic form complies with Mo. R. Civ. P. 84.06(g), because it has been scanned for viruses and is virus-free.

_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 22nd day of February, 2005, to:

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